In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE BELLINGHAM BAY BOOM COMPANY. } No. 161.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from the decision of the circuit court of appeals of the ninth circuit, affirming the decree of the circuit court refusing the United States an injunction, and dismissing its bill.

The original suit was brought by direction of the Attorney-General, upon the request of the Secretary of War, to enjoin the Bellingham Bay Boom Company from maintaining a boom in the Nooksack River, in the State of Washington, and for a decree requiring the removal of such obstruction. The Nooksack River is a navigable stream which rises in Skagit or Whatcom

County, Wash., and flows through the latter county, emptying into Bellingham Bay and forming, in connection with that bay, Hales Passage, the Straits of Juan de Fuca, and the Pacific Ocean, a continuous waterway from the head of navigation on the river between the State of Washington and the other States of the Union and foreign countries.

The obstruction complained of consists of a long boom at the point where the river flows into the bay, and was constructed by driving piles on each side of and across the channel of the river where the channel left the uplands and entered the tide flats of the bay, and by fastening to the piles long timbers called boom sticks, which extended from pile to pile so as to form a continuous and unbroken inclosure, sufficient to catch and retain within such inclosure all logs and floating driftwood which should be carried down the river.

THE BILL (Record, pp. 1 and 2).

The bill alleges that the defendant is a corporation organized under the laws of Washington. That the Nooksack River is a navigable stream which empties into Puget Sound, in Bellingham Bay, and that its waters are navigable from its mouth for several miles toward its source. That the defendant for more than one year has maintained and continues to maintain an obstruction in the navigable waters of the river, at and near where it empties into Bellingham Bay, the obstruction consisting of a boom at which logs floated down the river are moored, the boom being constructed in such manner as to blockade the river during a large portion

of the year, rendering navigation impossible. That the river is used for navigation by steamboats and small craft, and that the defendant has not obtained permission of the Secretary of War to continue or maintain the boom, and that the boom was constructed and is being maintained without his consent. The prayer is for a permanent injunction restraining the defendant from further continuing or maintaining the obstruction, and that the same be removed, and for general relief.

The bill was filed May 2, 1892. After a demurrer, which was overruled, the defendant filed its answer on July 23, 1894.

ANSWER (Record, pp. 9 to 14).

1. After a denial of averments not admitted, the answer admits:

2. Defendant's incorporation in June, 1890, giving the particulars, and averring that by virtue of its incorporation—

> Power and authority were given defendant in the waters of the Nooksack River, in the State of Washington, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of the defendant in catching, booming, sorting, rafting and holding logs, lumber, or other timber product, and to improve the said Nooksack River so as to facilitate the business of logging, driving, rafting, sorting, booming and holding logs, and protecting from loss those engaged in carrying on the same.

3. That the construction and maintenance of its boom was affirmatively authorized by the laws of Washington

in June, 1890, and under such authority the defendant, prior to September 19, 1890, constructed and maintained its boom for business purposes in strict accordance with the laws of Washington, and has continued to do so up to this time. The defendant has expended $50,000 in constructing and maintaining its boom.

4. That the Nooksack River is a small stream lying wholly within the State of Washington, emptying its waters into Bellingham Bay, and navigable for a few miles from its mouth by small light-draft water craft.

5. The defendant denies that its boom is constructed in such a manner as to blockade the river during a large portion of the year, but alleges that at certain periods, not to exceed twice a year, large quantities of brush, trees, and drift are, by freshets and excessively high water, carried down to the mouth of the river, where the same become lodged by reason of shoal water caused by widening of the river and the deploying of its waters into the bay. *The defendant during the past four years has expended $2,500 per year in improving the river by removing drift from its mouth and channel for 20 miles up.* The defendant alleges that by reason of the maintenance of its boom and the removal of the drift, the navigation of the river for boats and water craft has been greatly facilitated, and that in the absence of such improvement the mouth of the river would become entirely obstructed by drift.

6. Admits that it has not obtained permission of the Secretary of War to construct or maintain its boom, but alleges that at the time of construction there was no law commanding it to obtain such permission.

7. That immense forests of fir and cedar timber, of the market value of many millions of dollars, which constitute the chief wealth of Whatcom County, border on and are tributary to the Nooksack River and its branches, which is the natural and only outlet for most of this timber to the mills and market; that the commerce carried on upon the river by the transportation of goods, wares, and merchandise is and always has been trifling in amount, and in value greatly inferior to that of the logs and timber product floated out. The defendant is informed and believes that during the four years last past the total value of all goods so transported has not amounted to more than $5,000, while the value of the logs and timber floated down and rafted at defendant's boom during the same period amounts to $90,000.

8. That the chief value of the river is its use as an outlet for floating logs and timber; that the timber can not be floated out without the use of a boom located at the mouth of the river for catching, sorting, and rafting the same; that there are a number of sawmills located on the bay, which are largely dependent upon logs floated down the river.

9. The defendant alleges it has always maintained and operated the boom in accordance with the laws of Washington, and has exercised great care that it should not interfere with the navigation of the river by boats and water craft.

10. That Congress has never exercised legislative control or supervision over the waters of the river which in any manner controls or affects the location, maintenance, and operation of defendant's boom, and this court has no

jurisdiction to grant any relief in the premises, the only courts having jurisdiction being the courts of the State of Washington.

THE PROCEEDINGS.

The plaintiff demurred to paragraphs 2 to 10, inclusive, of the answer. (Rec., p. 15.) The demurrer was overruled on December 31, 1894 (Rec., p. 18), whereupon the plaintiff filed a general replication to the answer (Rec., p. 19). The issues being thus made up, the cause was referred to an examiner to take the proofs and report the same to the court. (Rec., p. 21.) The examiner, after being duly qualified, took the testimony (Rec., pp. 22 to 329) and reported it to the court. The cause was submitted upon this testimony, and the circuit court, on February 20, 1896, found in favor of the defendant and dismissed the bill. (See opinion, Judge Hanford, Rec., p. 332.) The United States appealed, and the circuit court of appeals for the Ninth circuit, Judges Gilbert, Ross, and Hawley, on June 28, 1897, affirmed the judgment of the circuit court. (See opinion, Hawley, J., Rec., p. 369.) From this decision an appeal was taken to this court.

The facts and findings of the circuit court, substantially adopted by the circuit court of appeals, appear in the opinion of Judge Hanford. (Rec., p. 337.)

OPINION OF JUDGE HANFORD.

> The evidence has been taken before an examiner, and reported to the court. At the time of introducing proofs *it was stipulated between the parties*

that the Nooksack River is a navigable stream, having its source in Whatcom County, and running through Whatcom County to Bellingham Bay, emptying its waters into said bay, and is navigable from its mouth for a distance toward its source by light water craft, and said river is wholly within said county.

On the part of the Government *nineteen witnesses* were called and sworn; two steamboat captains who have had practical experience in navigating the Nooksack River with small steamboats, one merchant, one proprietor of a sawmill, one fisherman, one schoolteacher, and a number of farmers and county officials. They all appear to have a general knowledge of the country through which the river flows, and the history of the settlement of the Nooksack Valley. The testimony of said witnesses being in general to the effect that *the piles driven to support the defendant's boom, and the boom itself, impedes the passage of steamboats*, and that it has a tendency to collect drift timber and cause shoaling at the mouth of the river by detaining the silt and sand, and causing the same to form a bar, and that navigation of the river by boats is interfered with by the bar and by jams of drift collecting therein, and by filling up of the channel.

For the defendant *nine witnesses* were sworn and have testified, including steamboat men, engineers, and the persons who superintended the work done by the defendant in constructing the boom and clearing the river of jams and obstructions, and their testimony tends to prove the allegations of the defendant's answer as to the particular time when the boom was constructed, the condition of the river prior thereto, *and the particular work and expenditures of the defendant in clearing the river of jams and*

keeping it open for navigation. As to these disputed facts the defendant's witnesses, having particular knowledge, are better able to testify intelligently, by reason of having made examinations and surveys, or being connected with the work done, than the witnesses for the Government, who speak only from a general knowledge. No engineer has been called by the Government to testify as to facts ascertained by an actual survey.

Upon consideration of all the evidence, I find that prior to the construction of the boom, trees and drift carried down the river by floods formed jams which obstructed navigation, requiring labor and expense to keep the river open, and that the boom company have, since commencing to construct the boom, at an expense of many thousand dollars, cut out, blasted, and removed all drift which prior to the commencement of this suit lodged in the vicinity of the boom and kept the mouth of the river *clear of obstruction other than the boom itself, and the saw logs collected therein, and by such expenditures and work the company has rendered ample recompense for the impediment to navigation of the river by vessels caused by its boom.*

The boom was constructed in the summer of 1890 and completed prior to the 19th day of September, 1890, the date of approval of the act of Congress pursuant to which this suit was instituted; and the construction of the boom was duly authorized, as alleged in the answer, by an act of the legislature of the State of Washington, approved March 17, 1890, which act authorizes the incorporation of boom companies, and section 3 provides: "Such corporations shall have power, and are hereby authorized, in any of the waters of this State, or the dividing waters thereof, to construct, maintain, and use all

necessary sheer or receiving booms, dolphins, piers, piles, or other structures necessary or convenient for carrying on the business of such corporations." (Laws of Washington, 1889–90, 470.)

By uncontradicted evidence it is shown that there are immense forests of timber which, when cut into saw logs, can be brought to market in the most convenient way by floating down the Nooksack River, the value of which is many times greater than the probable value of other products which may be transported upon the river, and to make the river available as a means for bringing timber to market it is necessary to maintain a boom at its mouth.

In view of all the facts, and considering that this river is wholly within the State, I hold, first, that the legislature of the State had ample power prior to the enactment by Congress of the river and harbor act of September 19, 1890, to authorize the construction of this boom, and that at the time of its construction it was authorized by law, and therefore not a nuisance nor an unlawful obstruction of navigation; and, in the second place, that the chief value of the Nooksack River as a highway is for the floating of saw logs, and that persons and corporations having occasion to use it for that purpose have rights equal to the rights of others to use the river as a highway for boats and vessels, and that a boom at the mouth of the river necessary for gathering and holding saw logs is to be regarded as an aid to the use of the river for a lawful purpose, and entitled to protection the same as a wharf or pier constructed at a convenient place for the convenience of vessels.

Observe what Judge Hanford concedes and what he concludes. He says the Government introduced *nineteen witnesses* who testified "that the piles driven to support

the defendant's boom, and the boom itself, impede the passage of small boats, and that it has a tendency to collect drift, etc., at the mouth of the river." On the other hand, the defendant introduced *nine witnesses* who testified when the boom was constructed, the condition of the river prior thereto, "and the particular work and expenditures of the company in clearing the river of jams and keeping it open for navigation." After considering this testimony the judge finds that prior to the construction of the boom the drift carried down the river by floods formed jams which obstructed navigation, requiring labor and expense to keep the river open, and that—

> The boom company have, since commencing to construct the boom, at an expense of many thousand dollars, cut out, blasted, and removed all drift which prior to the commencement of this suit lodged in the vicinity of the boom and kept the mouth of the river *clear of obstructions other than the boom itself, and the saw logs collected therein, and by such expenditures and work the company has rendered ample recompense for the impediment to navigation of the river by vessels caused by its boom.*

To say that the boom company has removed the drift and kept the mouth of the river "clear of obstructions, other than the boom itself and the saw logs collected therein," is to admit that the boom with the saw logs it collects is an obstruction.

To say that the company has rendered ample recompense for the impediment to the navigation of the river by vessels caused by its boom, is to concede that the boom is an impediment to navigation.

Here is a virtual finding that the nineteen witnesses for the Government have proved that the boom is an obstruction to navigation, but that the nine witnesses for the defendant have shown that the company has expended a large amount of money in clearing the river of drift and keeping it clear of obstructions other than the boom itself and the saw logs collected by it. And in view of this expenditure, the court finds that the public is amply recompensed for the impediment to navigation caused by the boom. In other words, the court holds that if the owner of a boom which blockades a river, and impounds it for his own benefit, expends money in clearing the river of drift, such expenditure legalizes the obstruction to navigation. This is strange doctrine. The owner of the boom cleared away the drift voluntarily and for his own benefit. He can not be compelled, even if allowed to maintain his boom, to continue such expenditures. He only did what the Government ought to do and is ready to do. All this testimony as to the expenditures made by the company in clearing away the jams and drift was outside the case.

The ultimate findings were:

1. The boom was authorized by the law of Washington, and therefore not an unlawful obstruction.

2. The chief value of the river is for floating logs, and those interested in using it for that purpose are as much entitled to have a boom for their convenience as owners of vessels are entitled to have a wharf or pier for theirs.

Respecting the second finding, it may be observed that there is a difference between a wharf and a boom like

this. A wharf helps those who run vessels and does not hurt those who run saw logs. A boom like this may help the lumbermen, but it ruins the steamboat men. Neither class should be allowed to appropriate the river to the exclusion of the other. The river should be so regulated as to be free to all.

Respecting the first finding, that the boom was a lawful obstruction because authorized by the law of Washington, I shall have something to say later. I may remark now that the circuit court of appeals, affirming this finding, held that it could not and would not inquire whether the boom had been constructed in accordance with the laws of Washington, and therefore was authorized by the laws of Washington. If there was a State law, and a boom claimed to have been built under it, then the question whether the boom was really built under the law or in violation of it was for the State courts to determine.

THE FACTS ESTABLISHED.

I submit that the following facts are established by the evidence:

The Nooksack River rises in either Skagit or Whatcom County, Wash., flows through Whatcom County into that portion of Puget Sound known as Bellingham Bay, and, in connection with that Bay, Hales Passage, the Straits of Juan de Fuca, and the Pacific Ocean, forms a continuous waterway from the head of navigation on the river to the several States of the Union and foreign countries.

The river is navigable from its mouth for from 20 to 30 miles toward its source for steamboats of from 2 to 5 and sometimes 7 feet draft and from 10 to 100 tons burden. This river has been so navigable, and has been navigated by vessels of the draft and tonnage mentioned, since the earliest settlements in that country, without serious impediment, until the building of defendant's boom in the year 1890. The country adjacent to the river is heavily timbered, and at times of heavy rains the waters come down the river in such volume as to form freshets, which wash into the river and carry down with the current large quantities of trees and driftwood, but with the exception of a small jam or two formed up the river some distance from its mouth, and which were removed by the settlers and steamboat men, this floating drift never created any obstruction to the navigation of the river. The drift thus floated down the river was carried out into the bay and thence to sea, and never at any time lodged in the channel at the mouth of the river, so as to obstruct navigation, until after the building of defendant's boom across the channel.

The boom of defendant consists of large piles driven in the tide lands on each side of the channel of the river, commencing near where that channel leaves the uplands and flows across the tide lands toward the waters of the bay, and parallels that channel on each side, toward the bay, until it reaches a point near the line of low water of the bay, when the line of piles crosses the channel and joins the line of piles on the other side, forming a "pocket," *thus completely inclosing the channel of the river*

from the uplands outward toward the bay for a distance of more than a half mile. To enable steamboats and other craft to navigate the river, and to facilitate the rafting of saw logs to market, a "trip" or opening was left at the point where the piling of the boom crossed the channel at the lower end. This "trip" was closed by two "boom sticks" bolted together and fastened, one end to a pile on one side of the channel, and, when there was no drift to prevent it, was opened for the passage of boats. *No passageway for boats is left between the boom and the opposite shore.*

The boom thus constructed inclosed the channel of the river below the uplands in a *cul de sac*, into which saw logs and driftwood floated, and were held and retained. In times of freshets these logs and drift came down in such quantities as to be beyond the power of defendant to control, and completely filled the boom and formed a "jam" nearly a half mile long and of such vast proportions as to completely fill up the channel and obstruct and prevent the passage of boats. This jam has rendered the "trip" useless; and whenever a boat has attempted to enter the mouth of the river it has been compelled to go up, outside, and to the east of the boom, across the tide flats *at high tide*, and enter the boom at a point above the drift, made by the defendant for the purpose. Many times when boats attempted to enter the river this way they became grounded on the flats and were caused great delay.

At the time of the survey for, and the construction of, the boom, the channel of the river was open and free from driftwood from the uplands to the deep water of

the bay. Prior to the building of the boom a considerable traffic by steamboats was carried on this river between the towns and settlements along the river and the cities of Whatcom, Seattle, and Tacoma. During this time boats made frequent trips up and down the river, carrying in merchandise and carrying out farm products. As many as two steamboats per day have been seen on the river during that time. But since the erection of the boom this traffic has wholly ceased.

The settlements along this river have been constantly increasing, and the farm products also greatly increasing, and the demand for steamboat transportation growing from year to year. The obstruction to navigation caused by this boom has caused, and is continuing to cause, irreparable injury to the settlers in the country adjacent to that river.

That as settlements and population increase, the necessity for river transportation will increase in the same ratio, and, by the same token, as the clearing of the land progresses the necessity for a log boom will decrease.

THE STATUTES.

Authority to construct the boom is claimed under section 3 of an act of the statutes of Washington, entitled "An act to declare and regulate the powers, rights, and duties of corporations organized to build booms and to catch logs and timber products therein," which provides:

> Such corporations shall have the power and are hereby authorized, in any of the waters of this State, or the dividing waters thereof, to construct, maintain, and use all necessary sheer or receiving booms,

> dolphins, piers, piles, or other structure necessary or convenient for carrying on the business of such corporations: *Provided, That such boom or booms, sheer booms, or receiving booms shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels, or steam crafts of any kind whatsoever, or for ordinary purposes of navigation* (1 Hill An. Stat. Wash., sec. 1592.)

Authority to compel the removal of the boom is claimed under section 10 of the river and harbor act of September 19, 1890 (26 Stat., 465), which reads as follows:

> That the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. * * * The creation or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

ARGUMENT.

I.

The boom which the Government seeks to have removed is constructed at the mouth of the Nooksack River, where it empties into Bellingham Bay. Any

improvement of the river for purposes of navigation would be an improvement above this obstruction. The existence of the boom is therefore inconsistent with the improvement of the river as a navigable stream. If Congress made appropriations for the improvement of this river prior to the construction of the boom, I submit it shows that Congress assumed jurisdiction and exercised control over the river in such a way as to take it out of the power of the State to authorize the construction of a boom across its mouth.

Congress has assumed jurisdiction and exercised control over the Nooksack River since 1884 by making appropriations for its improvement, as follows:

On July 5, 1884 (23 Stat., 144):

> Improving the Skagit, Stillaguamish, *Nootsack* Snohomish and Snoqualmie rivers, Washington Territory: Continuing improvements, ten thousand dollars.

On August 5, 1886 (24 Stat., 327):

> Improving Skagit, Steilaquamish, *Nootsack*, Snohomish, and Snoqualmie rivers, Washington Territory: Continuing improvement, ten thousand dollars.

On July 31, 1888 (25 Stat., 423):

> Improving Skagit, Stielaquamish, *Nootsack*, Snohomish and Snoqualmie rivers, Washington Territory: Continuing improvement, fifteen thousand dollars; of which five thousand dollars shall be used for a snag boat and outfit.

On September 19, 1890 (26 Stat., 452):

> Improving Shagit, Stielaquamish, *Nootsack*, Snohomish, and Snowqualme rivers, Washington: Continuing improvement, twelve thousand dollars.

On September 19, 1890 (26 Stat., 456, 464):

SEC. 17. That the Secretary of War is hereby directed, at his discretion, to cause examinations or surveys, or both, to be made, and the estimated cost of improvement to be estimated, at the following localities, to wit: * * *

Washington.

Nooksack River, Skagit, Snohomish, D'Wamish, Black, Puyallup, Nasel, North, Gray's, Deep, Skamakawa, and Crooked rivers.

On July 13, 1892 (27 Stat., 111, 115):

SEC. 6. That the Secretary of War is hereby directed to cause preliminary examinations to be made at the following localities, to wit: * * *

Washington.

Nooksack River, with a view of removing obstructions, straightening channel to prevent jams and the filling of Bellingham Bay with deposits of earth.

On August 7, 1894 (28 Stat., 369, 371):

SEC. 12. That the Secretary of War is hereby directed, at his discretion, to cause surveys to be made and the cost of improvement to be estimated at the following localities, to wit:

Washington.

* * * *Nootsack River.* * * *

On June 3, 1896 (29 Stat., 234):

Improving Puget Sound and its tributary waters, Washington: Continuing improvement, including

> the rivers Skagit, *Nooksak*, Duwamish, and Puyallup, seventy-five thousand dollars, of which sum so much thereof as may be necessary may be used for the rebuilding of a snag boat.

On July 29, 1886 (24 Stat., 160), Congress authorized the Bellingham Bay Railway and Navigation Company *to construct bridges over the Nooksack* and other rivers. The plans for such bridges to be first submitted to and approved by the Secretary of War, he to fix the rates of toll to be charged. *The bridges to contain draws, so as not to hinder or impair the free navigation of the streams.* Congress reserved the right to require changes to be made in the bridges at the cost of the owners, or to require the entire removal thereof, *in order to preserve the free navigation of the rivers.* The act concludes with this proviso:

> *Provided*, That nothing in this act shall be so construed as to repeal or modify any of the provisions of law now existing in reference to the protection of the navigation of rivers, or to exempt said bridges from the operation of the same.

I am aware that, in *Willamette Iron Bridge Co.* v. *Hatch* (125 U. S., 1), it was held that the making of appropriations for improving the Willamette River did not amount to an assumption by Congress of police power over it. But a careful examination of that case shows that the decision was based upon the fact that there was no statute of the United States authorizing the bringing of an injunction suit to require the removal of an obstruction in navigable waters within a State. In the present case, as we shall show, there is an express statute authorizing the suit brought.

In *Wisconsin* v. *Duluth* (96 U. S., 379), the action of Congress in appropriating money for and exercising supervision over the improvement of the harbor at Duluth was deemed by this court sufficient to warrant the conclusion (p. 386) that Congress had adopted the canal and harbor improvement originally started by the city of Duluth. The court therefore refused to enjoin the harbor improvement, holding that the work being done was by Congress, under its authority to regulate commerce among the several States.

II.

The boom under consideration was built in tide waters, at the mouth of this river. Before considering the authority of the States, in the absence of legislation by Congress, to authorize obstructions in navigable streams, it may be well to refer to the underlying inalienable interest of the public in all navigable waters.

In the case of the *Illinois Central Railroad* v. *Illinois* (146 U. S., 387), it was held that an act of Illinois granting the railroad company certain submerged lands in the harbor of Chicago, adjacent to its property, was inoperative and void, because in disregard of a public trust. The court held that the State was powerless to deprive the public of the interest it had in these valuable waters. Here are pertinent extracts from the opinion of the court, delivered by Mr. Justice Field:

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> It is the settled law of this country that the ownership of and dominion and sovereignty over lands

covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. (*Pollard's Lessee* v. *Hagan*, 3 How., 212; *Weber* v. *Harbor Commissioners*, 18 Wall., 57.)

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It [the title held by the State of Illinois] is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title *held in trust for the people of the State that they may enjoy the navigation of the waters*, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged

cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. *Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.* The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and water remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.

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In *People* v. *New York and Staten Island Ferry Co.* (68 N. Y., 71, 76), the court of appeals of New York said:

The title to lands under tide waters within the realm of England, were, by the common law, deemed to be vested in the King as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The King, by virtue of his proprietary interest could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, *and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void.* In his treatise De Jure, Maris (p. 22), Lord Hale says: "The *jus privatum* that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use;" and Mr. Justice Best, in *Blundell* v. *Catterall* (5 B. & A., 268), in speaking of the subject, says: "The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil."

The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. *The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce*, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it.

The boom as constructed is an obstruction to the common right in the navigation of this river. It has practically destroyed its navigation by boats. It has served not only to impede and obstruct navigation, but as a virtual exclusive appropriation of the navigable waters at the mouth of the river and the submerged land under and above the boom. If the State of Washington attempted to authorize the construction of such a boom, its action was violative of a public trust and void.

III.

While I deny the right of a State to give away a navigable river to a private corporation, I concede that until Congress assumes control of navigable waters within a State the State may by appropriate legislation regulate the use of such waters. But such power of the State is always subject to the paramount authority of Congress when it sees fit to take control.

I deny that a State may legally permit a private company to dam a navigable river and use it for an ice pond, but I admit that it may authorize the construction of bridges, piers, wharves, booms, and other aids to navigation pending legislation by Congress indicating an intention to assume jurisdiction over the waters. But this power in the State is always subject to the limitation that Congress may interpose at any time, may regulate all obstructions, fix the conditions upon which they may be created or maintained, and determine what shall be removed and how.

I have taken pains to read carefully the cases cited by opposing counsel in support of the power of the State to

authorize this boom, and this court, when upholding the power of the State in the absence of action by Congress, has been careful to reserve and emphasize the supreme and paramount power of the United States whenever Congress shall see fit to interpose, as it has done by the act of September 19, 1890.

In the great case of *Gibbons* v. *Ogden* (9 Wheat., 1), argued by Mr. Webster and others, in which the opinion was delivered by Mr. Chief Justice Marshall, it was held that certain acts of New York granting to Livingston and Fulton the exclusive right to navigate the waters within the jurisdiction of that State with steamboats for a term of years were repugnant to the clause of the Constitution which authorizes Congress to regulate commerce among the several States and with foreign nations.

Mr. Chief Justice Marshall thus defines the power vested in Congress to regulate commerce (p. 196):

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.

Again, page 197:

> The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes."

Is the right claimed as granted in the case at bar,—a right to build a boom across a navigable river at its

mouth and thus monopolize the stream for logging purposes, any less exclusive than that involved in *Gibbons* v. *Ogden?*

The case of *Wilson* v. *Black Bird Creek Marsh Co.* (2 Peters, 245) grew out of the construction of a dam across a navigable creek emptying into the Delaware River. The dam was built by authority of a law of Delaware, for the purpose of reclaiming certain marsh lands. Wilson and others were the owners of the sloop *Sallie*, and, to get into the creek, attempted to destroy the dam. The Supreme Court affirmed a judgment for damages in favor of the dam owners. This was on the ground that the construction of the dam for the purpose of reclaiming the marsh, and thus improving the health of the inhabitants of the locality, was within the police power of the State, and Congress had passed no act indicating an intention to protect the navigation of the Black Bird Creek. Mr. Chief Justice Marshall says (bottom p. 250):

> *If Congress had passed any act which bore upon the case;* any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States; *we should not feel much difficulty in saying that a State law coming in conflict with such act would be void.* But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

In the case of *Pennsylvania* v. *Wheeling Bridge Company* (13 Howard, 518) (known as the Wheeling Bridge Case), this court, at the instance of the State of Pennsylvania, held that a bridge being constructed over the Ohio River at Wheeling was a nuisance, and ordered its alteration or removal. This was done because the Ohio River, by the ordinance organizing the Northwest Territory, and by the action of Congress sanctioning the compact between Virginia and Kentucky, had been recognized by the United States as a navigable stream, the use of which was to be kept free and open to all the people. Mr. Justice McLean, speaking for the court, said, page 566:

> No State law can hinder or obstruct the free use of a license granted under an act of Congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction. Congress might punish such an act criminally, but until they shall so provide, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance.

It was urged in this case that while the bridge might, to some extent, obstruct navigation, yet it subserved the demands of commerce by furnishing a highway across the river, and that the advantages the bridge furnished overbalanced the injuries it did. Upon this point the court said, page 577:

> It is said that the interest of commerce requires navigable waters to be crossed, and that in such a case the inquiry should be, whether the benefit conferred upon commerce by the cross route is not

greater than the injury done. In the case of the *King* v. *Sir John Morris* (1 Barn. & Adol., 441) it was held, that the injury can not be balanced against the benefits secured. And in the case of the *King* v. *George Henry Ward* (4 Ad. & El., 384) it was held, where the jury found that an embankment complained of was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, it amounted to a verdict of guilty.

Subsequently Congress passed an act declaring the Wheeling Bridge, as it stood, to be a lawful structure, so the mandate of the court was never executed, the court, in the next decision in this case (18 How., 421), holding that the power of Congress being absolute in the premises, the authority of the bridge company to maintain the bridge existed from the moment of the passage of the act declaring the bridge a lawful structure.

The case of *Gilman* v. *Philadelphia* (3 Wall., 713) grew out of the construction by the city of Philadelphia of a bridge over the Schuylkill River at Chestnut street. Gilman owned a wharf on the Schuylkill above Chestnut street. It was conceded that the bridge would prevent vessels reaching his wharf. The bridge was constructed under authority of a law of Pennsylvania. It was insisted that this law was void, because it authorized an obstruction of a navigable stream, recognized as such by acts of Congress. The court held, however, that there was no act of Congress applicable to the Schuylkill River at this point. In the absence of legislation by Congress regulating the construction of bridges across this stream, the legislature of Pennsylvania had power to act. The

court was very careful, however, to reserve the supreme and absolute power of Congress over the subject, in case it should see fit to legislate, saying by Mr. Justice Swayne (bottom p. 731):

> *Lastly, Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them.* Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary.

Mr. Justice Clifford, with whom concurred Mr. Justice Swayne and Mr. Justice Davis, dissented, on the ground that, for reasons stated in the dissenting opinion (p. 732), Congress had regulated the navigation of the Schuylkill River, and that the State law authorizing the construction of the bridge and the obstruction of the stream was void.

Pound v. *Turck* (95 U. S., 459) grew out of a suit brought by Turck and others against Pound and others. The latter had constructed a boom in the Chippewa River, Wisconsin, which obstructed the stream and damaged a raft of lumber belonging to the former. The owners of the boom defended on the ground that they had constructed it under authority of an act of the legislature of Wisconsin. Mr. Justice Miller delivered the opinion of the court. He conceded that the Chippewa River was a navigable stream lying wholly within the State of Wisconsin, and that the boom operated as an obstruction to navigation. After commenting upon the

Black Bird Creek Case and the case of *Gilman* v. *Philadelphia*, he says (p. 464):

> The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom. There are within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so as to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. *And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so*, the exercise of this limited power may all the more safely be confided to the local legislatures.

It will be observed that this case, like the *Black Bird Creek Case* and *Gilman* v. *Philadelphia*, turns on the fact that Congress had not exercised with respect to this particular stream its right to regulate commerce among the several States. In each of these three cases the court was careful to say that whenever Congress should see fit to interfere in order to protect the public rights in the stream then its authority would become paramount, and

whatever had been done under State legislation might be wiped out. It was for this very reason, because of the reserved power in Congress, that the right of the State to legislate in the interim was sustained.

South Carolina v. *Georgia* (93 U. S., 4) was an original bill in this court, filed by the State of South Carolina to enjoin the State of Georgia and the Secretary of War from carrying out an improvement of the Savannah River, which closed one of its several channels, to the alleged injury of South Carolina and its citizens. The plaintiff relied largely upon the compact between South Carolina and Georgia, made in 1787, by which it was agreed that the boundary between the two States should be the northern branch of the Savannah River and that the navigation of the river along a specified channel should be forever free. The court attached no importance to the compact because, after it was made, both States became members of the United States, and joined in delegating to Congress the right to regulate commerce with foreign nations and among the several States. The court expressly adopts the language of *Gilman* v. *Philadelphia*, where the court held that the power to regulate commerce includes the power to keep the navigable rivers "*open and free from any obstructions to their navigation interposed by the States, or otherwise; to remove such obstructions where they exist;* and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders" (p. 10).

Respecting the contention that Congress could not place an obstruction in a navigable stream, for any pur-

pose, the court, speaking by Mr. Justice Strong, said, bottom page 11:

> It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of a stream. It may construct jetties. *It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage.* If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over interstate and foreign commerce is concerned, this is not to be doubted.

There can be no doubt, therefore, of the authority of Congress to cause the removal of this boom in the Nooksack River, although it was constructed by express authority of the State of Washington.

The case of *Wisconsin* v. *Duluth* (96 U. S., 379) was an original action brought in this court by the State of Wisconsin against the city of Duluth to enjoin a harbor improvement then being made under authority of Congress, which it was claimed changed the natural outlet into Lake Superior in the neighborhood of Superior City and Duluth, and injured the State of Wisconsin and its citizens. Mr. Justice Miller delivered the opinion of the court. After describing the character of the improvement and the action of Congress in appropriating money for and exercising supervision over the improvement at Duluth, he reaches the conclusion (p. 386) that Congress had adopted the canal and harbor improvement

originally started by the city of Duluth and that the work so to be enjoined was being done by Congress itself. Then he says (p. 387):

> While this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the General Government in the same matter, the doctrine has been laid down with unvarying uniformity, *that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority.* The adjudged cases in this court on this point are numerous.

The Bridge Company v. *United States* (105 U. S., 470) was a suit brought by the Newport and Cincinnati Bridge Company against the United States to recover the cost of altering the bridge in accordance with an act of Congress. Congress by a resolution gave its assent to the erection of this bridge across the Ohio, but expressly reserved "the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." The court, Justices Miller, Field, and Bradley dissenting, held that, under the circumstances, the company erected the bridge at its own risk. Whether, under the resolution, the bridge became a material obstruction to navigation was for Congress to determine. Mr. Chief Justice Waite, speaking for the court, said, page 475:

> The paramount power of regulating bridges that affect the navigation of navigable waters of the

> United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States [citing cases].

Again, page 479:

> But the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. *The action of Congress is supreme, and overrides all that the States may do. When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. Those who act under State authority alone necessarily assume all the risks of legitimate Congressional interference.*

Again (p. 480):

> Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the Government.

Mr. Justice Miller in his dissenting opinion conceded the authority of Congress to require the alterations in the bridge, but took the view that because of the wording of the act providing for the alterations Congress intended to waive certain rights of the United States and refer the matter to the court for the purpose of making compensation for the required changes.

Mr. Justice Field placed his dissent upon the broad ground that Congress had no authority to compel the alteration or removal of this bridge, seeing it was not shown to be a material obstruction to navigation. He says (p. 500):

> Under this act the present bill was filed, and it was clearly shown at the hearing that when the act was passed the bridge had been constructed substantially in compliance with all the provisions of law in relation thereto; that so far as constructed it did not materially obstruct the navigation of the river, and would not have done so had it been completed according to the original plan. Yet the court below held, and this court sustains its ruling, that for the enormous expenditures forced upon the company the United States are in no way responsible. *This court thus, in effect, decides that the power of Congress over all structures crossing navigable streams is absolute; and that it can change or remove them at its pleasure, without regard to their effect upon the free navigation of the streams, and without compensation to the owners.*

Mr. Justice Bradley dissented, for the reason that the bridge was a lawful structure, the property of the bridge company, and that Congress could not constitutionally require its demolition or reconstruction without providing for compensation to the owners. Respecting the proviso in the original resolution of the right of Congress to withhold its assent in case the free navigation of the river should be materially obstructed and to direct any necessary alterations, he says, page 508:

> The power thus reserved was merely declaratory of the power which Congress would have had with-

> out reserving it; but there is no stipulation or condition that it might be exercised without providing for compensation to the proprietors of the bridge; and inasmuch as the bridge became a lawful structure—was, in fact, expressly declared such by the resolution of 1869—it can not be presumed that this reserved power was to be exercised in any other than the constitutional mode.

In *Cardwell* v. *American Bridge Co.* (113 U. S., 205) the authority of California to authorize the construction of a bridge over a navigable stream wholly within its limits was sustained, notwithstanding the bridge wholly obstructed the navigation of the stream. The original case was one in equity for the removal of the bridge. The river involved was a branch of the Sacramento; it was wholly within the State of California. After citing *Wilson* v. *Black Bird Creek Marsh Co.*, *Gilman* v. *Philadelphia*, *Pound* v. *Turck*, and other similar cases, the court, speaking by Mr. Justice Field, says (p. 208):

> They recognize the full power of the States to regulate within their limits matters of internal police, which embraces, among other things, the construction, repair and maintenance of roads and bridges, and the establishment of ferries; * * * and that, as to bridges over navigable streams, their power is subordinate to that of Congress, as an act of the latter body is, by the Constitution, made the supreme law of the land; but that until Congress acts on the subject their power is plenary. *When Congress acts directly with reference to the bridges authorized by the State, its will must control so far as may be necessary to secure the free navigation of the streams.*

The Willamette Bridge Co. v. *Hatch* (125 U. S., 1) was originally an injunction suit, brought by a wharf owner in Portland, to restrain the construction of a bridge across the Willamette River, which he claimed obstructed navigation and interfered with the access of vessels to his wharf. The bridge was being built under authority of a law of Oregon. This court found in favor of the bridge company and dismissed the suit, saying, by Mr. Justice Bradley, page 8:

> There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offenses against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such; *but they are not offenses against the United States laws which do not exist;* and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different States the circuit courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Wilson* v. *Black Bird Creek Co.*, 2 Pet., 245; *Pollard's Lessee* v. *Hagan*, 3 How., 212, 229; *Passaic Bridges*, 3 Wall., 782, App.; *Gilman* v. *Philadelphia*, 3 Wall., 713, 724; *Pound* v. *Turck*, 95 U. S., 459; *Escanaba Co.* v. *Chicago*, 107 U. S., 678; *Cardwell* v. *American Bridge Company*, 113 U. S., 205; *Hamilton* v. *Vicksburg, &c., Railroad Co.*, 119 U. S., 280; *Huse* v. *Glover*, 119 U. S., 543;

Sands v. *Manistee River Imp. Co.*, 123 U. S., 288; *Transportation Co.* v. *Parkersburg*, 107 U. S., 691, 700. The usual case, of course, is that *in which the acts complained of are clearly supported by a State statute; but that really makes no difference.* Whether they are conformable or not conformable to the State law relied on is a State question, not a Federal one. *The failure of State functionaries to prosecute for breaches of the State law does not confer power upon United States functionaries to prosecute under a United States law when there is no such law in existence.*

It will be observed that the court based its conclusions upon the absence of any United States statute authorizing a suit to restrain or abate an obstruction in navigable waters. It says it makes no difference whether the obstruction complained of is or is not authorized by a State law. In either event the United States courts have no jurisdiction. Of course this language does not apply where there is a statute, like that before the court, expressly authorizing injunction suits to restrain and abate unlawful obstructions in navigable waters.

After referring to a number of cases in which the authority of the States to authorize obstructions to navigation was upheld because of the absence of any Congressional legislation on the subject, the following language is used which sustains to the fullest extent the absolute power of Congress in the premises when it sees fit to act (and it has acted in the case before the court), bottom page 12:

> We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only

say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the States have the plenary power supposed, yet, *when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose.* It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams.

Monongahela Navigation Co. v. *United States* (148 U. S., 312) grew out of the condemnation by the United States, under an act of Congress, of a lock and dam on the Monongahela River belonging to this navigation company. This lock and dam had been constructed by authority of an act of the legislature of Pennsylvania, empowering the navigation company to collect tolls. The lower courts held that in ascertaining the compensation to be paid by the United States, the franchise of taking tolls was not to be considered. The Supreme Court reversed this judgment, holding that the value of the lock and dam was due to its use—to the right annexed of exacting tolls. Mr. Justice Brewer, who delivered the opinion of the court, comments on the cases of *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet., 245; *Pound* v. *Turck*, 95 U. S., 459; *Huse* v. *Glover*, 119 U. S., 543; *Sands* v. *Manistee River Improvement Co.*, 123 U. S., 288; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S., 1; and

Bridge Co. v. *United States*, 105 U. S., 470, and says, page 336:

> It can not be doubted, in view of the long list of authorities,—for many more might be cited,—that Congress has the power, in its discretion, to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela River as in its judgment the public interests demand. *Its dominion is supreme.*

In *Shively* v. *Bowlby* (152 U. S., 1, 58), this court had to deal with a conflict as to the title of certain lands below high-water mark in the Columbia River, in the State of Oregon, between parties claiming, respectively, under the United States and under the State of Oregon. The entire subject was thoroughly examined, including a review of all the cases, both State and Federal, and one of the conclusions reached was thus stated by Mr. Justice Gray, page 58:

> Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

In *Eldridge* v. *Trezevant* (160 U. S., 452), the doctrine existing in the State of Louisiana that lands abutting on

the rivers and bayous were subject to the servitude in favor of the public, whereby such portions thereof as were necessary for the purpose of making and repairing public levies might be taken, in pursuance of law, without compensation, was fully recognized as enforceable, notwithstanding the fourteenth amendment.

In *Gibson* v. *United States* (166 U. S., 269), it was held that the owner of a farm on an island in the Ohio River had no valid claim against the United States for injuries resulting from the construction of a dike in the river which destroyed the landing of the claimant and prevented free egress and ingress to her farm from the river. Mr. Chief Justice Fuller, speaking for the court, said, bottom page 271:

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect to navigation created in favor of the Federal Government by the Constitution. (*South Carolina* v. *Georgia*, 93 U. S. 4; *Shively* v. *Bowlby*, 152 U. S., 1; *Eldridge* v. *Trezevant*, 160 U. S., 452.)

Again, page 276:

> In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

IV.

If Congress, by making appropriations for the improvement of the Nooksack River and by passing the act of July 29, 1886 (24 Stats., 160), authorizing the construction of bridges over this river under certain conditions, did not show an intention to assume and exercise its authority over the stream, so as to preserve it from obstructions and keep it free for navigation, then I submit that by the passage of the river and harbor act of September 19, 1890 (26 Stats., 453), Congress, by enacting sections four to ten, inclusive, assumed control of this river along with other navigable waters of the United States. This act was passed for the express purpose of placing all the navigable waters of the United States under the control of the General Government. For the convenience of the court I print these sections as an appendix.

Sections 4 and 5 of this act (amending sections 9 and 10 of the act of August 11, 1888) give the Secretary of War authority to regulate all bridges ("railroad or other") and to require the alteration or removal of those which obstruct navigable waters.

The sixth section makes it a misdemeanor to deposit any material in any harbor or river to the obstruction of navigation. At the same time the Secretary of War is given authority to permit such deposits in places where navigation will not be obstructed.

Section 7 makes it a misdemeanor to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside harbor lines or in

any navigable waters where no harbor lines are established, without the permission of the Secretary of War, in such manner as shall obstruct navigation. It makes it unlawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port or navigable waters of the United States, under State authority, until the location and plan of the bridge or other works shall be submitted to and approved by the Secretary of War, or to excavate, fill, or alter the channel of any navigable waters of the United States until approved or authorized by the Secretary of War.

Section 8 provides that all wrecks and other obstructions which have been allowed to remain in navigable waters for a longer period than two months may be broken up and removed by the Secretary of War.

The ninth section makes it unlawful for any person to build upon, obstruct, or injure in any way any sea wall, bulkhead, jetty, pile, levee, wharf, pier, or other works built by the United States.

These sections would seem to cover the ground and regulate all possible obstructions to navigable waters. The alteration or removal of offending bridges of any kind (sections 4 and 5); the unlawful deposit of material calculated to obstruct navigation (section 6); the building of any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside harbor lines, or where there are no harbor lines (section 7); the building of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any navigable waters (section 7); the removal

of wrecks and similar obstructions (section 8); the injury or unlawful use of jetties, piles, wharves, or other improvements made by the United States (section 9); but Congress was not content even to leave the matter thus. It enacted section 10 which provides:

> That the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited.

This is a provision which looks to the future. It prohibits *the creation* of any obstruction. This means, of course, creation after the passage of the act. By the preceding sections Congress provided for the alteration or removal of offending bridges by the Secretary of War. It made it an offense to build "any wharf, pier, dolphin, dam, weir, breakwater, bulkhead, jetty, *or structure of any kind*," without the permission of the Secretary of War. It made it a misdemeanor to commence the construction "of any bridge, bridge draw, bridge piers and abutments, causeway, *or other works*," although authorized by an act of the legislative assembly of a State, until the location and plan of such works should be submitted to and approved by the Secretary of War.

Is it possible that Congress, after making these stringent prohibitions, intended by the opening sentence of section ten to authorize any obstruction to the navigable capacity of any waters in respect of which the United States has jurisdiction which any State may see fit to permit? To state this question is to answer it. I submit that Congress intended by this comprehensive provision to prohibit the creation of *any* obstruction to the

waters not affirmatively authorized by the law of the Government which assumed jurisdiction to prohibit the obstruction—that is, the law of the United States. The preceding sections authorize the creation of certain obstructions in a lawful way. After providing how authority might be obtained to create such obstructions, Congress inserted this provision which applies to all obstructions. Section seven expressly provides that no boom can be built in any navigable waters without permission of the Secretary of War, yet the courts below and opposing counsel insist that under section ten a boom may be built in navigable waters by permission of a State!

It is not to be assumed that Congress in using the words "affirmatively authorized by law" meant "affirmatively authorized by law of the United States or of any State." On the contrary, the presumption is that Congress had in mind its own law. By this act Congress assumed control of a subject over which its jurisdiction when once exercised was supreme. When Congress legislates upon a subject over which its jurisdiction is paramount, and it intends to place limitations upon its authority, it uses affirmative expressions—words about which there can be no mistake. It has done this in section seven where it uses the phrase "under any act of the legislative assembly of any State." To construe the words "affirmatively authorized by law" to apply to State legislation is to say that Congress intended to prohibit all obstructions to the navigable capacity of waters in respect of which the United States has jurisdiction, except such obstructions as the States might see fit to

authorize. By this construction Congress assumed jurisdiction over the waters of the United States and at the same time abdicated control in favor of the States.

Section 10 proceeds:

> The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense.

I submit that the words "such obstruction" refer to the obstruction the creation of which is prohibited; that is, an obstruction which is not affirmatively authorized by the law of the United States, which is not recognized as lawful by the United States. Congress intended to assume full jurisdiction and require the removal of all obstructions which it did not see fit to recognize as lawful. It makes an exception in favor of bridges, because the act contains in sections four and five provisions for the alteration or removal of offending bridges, and of piers, docks, and wharves, and similar structures erected for business purposes, because such structures are really appurtenant to the shore and are built in aid of navigation.

The case of *United States* v. *Burns* (54 F. R., 351), was cited by opposing counsel in the lower courts in support of their contention that the words "affirmatively authorized by law" refer to action by the States through their legislatures as well as to action by the United States through Congress. This case was decided by the circuit court for the district of West Virginia (Judges Goff and Jackson). Judge Goff delivered the opinion. The court passed upon the validity of an indictment,

containing six counts, charging the defendants with violating the provision of sections 6, 7, and 10 of the act of September 19, 1890, by obstructing the navigation of the Little Kanawha River in various ways. The court very properly quashed the indictment because of the manner in which the offenses were charged. In doing this, the court had occasion to express its view of what Congress prohibited by the tenth section, which is involved in the case at bar, page 362.

> What is it that the Congress has prohibited by the tenth section? All obstructions to the navigable capacity of the river are not prohibited, but only those "not affirmatively authorized by law." This legislation, in effect concedes that which is well known to be true, that the necessities of commerce, the interests of the country, demand that certain obstructions to the navigable capacity of our rivers must be authorized, and their creation permitted. Under certain circumstances, bridges, piers, docks, dams, and booms, the object of which is to facilitate trade and commerce, become in many instances serious obstructions to the navigable capacity of our waters, and yet they are "affirmatively authorized by law." In the seventh section of the act under consideration, *Congress has authorized the building of many structures that may obstruct or impair the navigable waters of the United States, provided the permission of the Secretary of War has been first obtained.* By that section it is made unlawful to hereafter build in the navigable waters of the United States, any structure of any kind in such manner as will obstruct or impair navigation, *without the permission of the Secretary of War. The evident intention of Congress was to take exclusive charge of such matters*

in the future for the United States, and to place them under the charge of the Secretary of War, leaving it to his discretion to authorize or prohibit the building of the structure and the creation of the impairment of navigation; thus rendering it unnecessary to apply to Congress for permission, or special legislation in particular cases, as had frequently been done theretofore. At the time of the passage of this act authority to build structures of the character mentioned in it had been given by the States as well as by the United States, and *Congress did not intend to prevent their construction absolutely, but prohibited those only authorized by the legislative assembly of the States until the location and plan of the structure had been submitted to and approved by the Secretary of War*. It was thus possible, even after the passage of the act, to construct certain structures in a manner prohibited by the act, provided it had been authorized by law previous to such enactment.

The portions of this extract which I have placed in italics are sufficient, I think, to show that the court took the view that the words "affirmatively authorized by law" refer to Congressional action, and not to State. Judge Goff says: "The evident intention of Congress was to take exclusive charge of such matters in the future for the United States."

In *Lake Shore and Michigan Railway* v. *Ohio* (165 U. S., 365), it was held that sections 4, 5, and 7 of the act of September 19, 1890, do not deprive the States of authority to regulate bridges over navigable waterways within their limits, but simply create an additional remedy for preventing the obstruction of navigable streams by such structures. The case was a suit in quo warranto,

brought by the State of Ohio to oust the railway company from the franchise of maintaining a bridge over the Ashtabula River which obstructed the navigation of that stream. The Ohio courts ordered the railway company to alter the bridge or remove it. The case was carried to this court upon the contention that the act of September 19, 1890, conferred upon the Secretary of War exclusive authority to regulate such bridges, and that therefore the State of Ohio had no power to do what it had done in the case. The contention was overruled and the judgment of the supreme court of Ohio affirmed. The court was clearly right. Section 7 expressly recognizes the power of a State legislature to authorize the erection of a bridge, subject, of course, to the approval of the Secretary of War.

V.

Conceding, for the sake of the argument, that the words, "affirmatively authorized by law," refer to State action, I submit that the boom was not authorized by the law of the State of Washington, because it was not built in compliance with that law, but in violation of it. The act of Washington provides:

> That such boom or booms, sheer booms or receiving booms, shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels, or steam crafts of any kind whatsoever, or for ordinary purposes of navigation.

This boom leaves no free passage for steamboats between it and the opposite shore. It crosses the channel.

It blocks the river at its mouth. I refer the court to the maps in the record. This is a navigable river. The authority of the United States over it is supreme. Congress has assumed control, and, authorized by it, the Government has called upon the boom company to show its authority for obstructing the river and impeding navigation. The company produces the law of Washington. The Government says: "That law authorizes a boom, but not the one you have built. The boom it authorizes is one constructed so as to allow the free passage of steamboats between it and the opposite shore. Yours is not so constructed. It crosses the channel. It prevents the passage of steamboats. It is not authorized by law."

To this the boom company retorts: "There is the law. Whether our boom conforms to it is a State question. It is none of your concern."

The boom company is right in one sense. We can not call it to account for a breach of the law of Washington, but we can call it to account for obstructing this river, and if it sets up State authority, we can insist it show that it pursued that authority, complied with its conditions, and conformed to its requirements.

If a State law permits the building of a wharf inside established harbor lines, the law can hardly serve as authority for building a wharf outside such lines. So, if the State law allows the building of a boom part way across a river, so as to leave a free passage for steamboats between it and the opposite shore, it gives no authority to build the boom clear across the river, so as completely to obstruct navigation.

Another consideration. In applying the words "affirmatively authorized by law," effect must be given to the word "affirmatively." Congress used this word for a purpose. It meant that neither by implication nor by acquiescence could an obstruction to navigable waters be legalized. The Boom Company relies on State authority. It must therefore show that the State "affirmatively authorized" its boom. That the State has stood by and acquiesced in the erection and maintenance of a boom, which its law did not and does not affirmatively authorize, is not sufficient.

I submit that the judgments of the lower courts should be reversed and the case remanded, with instructions to enter a decree for the United States.

JOHN K. RICHARDS,
Solicitor-General.

FEBRUARY 7, 1899.

APPENDIX.

RIVER AND HARBOR ACT OF SEPTEMBER 19, 1890.

(26 Stats., 453, 454.)

SEC. 4. That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of war shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.

SEC. 5. That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That if the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises such persons, corporation or association shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed.

SEC. 6. That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or

may be impeded or obstructed: *Provided*, That nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft any stones, rocks, bricks, lime, or other materials used, or to be used, in or toward the building, repairing, or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be erected on the banks or sides of any port, harbor, haven, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters, into such places and in such manner as may be deemed by the United States officer supervising said improvement most judicious and practicable and for the best interests of such improvements, or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby.

SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted

to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State.

SEC. 8. That all wrecks of vessels and other obstructions to the navigation of any port, roadstead, harbor, or navigable river, or other navigable waters of the United States, which may have been permitted by the owners thereof or the parties by whom they were caused to remain to the injury of commerce and navigation for a longer period than two months, shall be subject to be broken up and removed by the Secretary of War, without liability for any damage to the owners of the same.

SEC. 9. That it shall not be lawful for any person or persons to take possession of or make use for any exclusive purpose, or build upon, alter, deface, destroy, injure, obstruct, or in any other manner impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works.

SEC. 10. That the creation of any obstruction not affirmatively authorized by law to the navigable capacity

of any waters in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharfs, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creation or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.